

Good Faith Governance: Risk Management in Government Procurement Contracts

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Abstract

The parties' good faith must accompany implementing goods/services procurement agreements. Good faith is a filter based on moral values and decency. In the contract for the procurement of goods/services, the government is said to have the ability to pay (solve) to the provider in accordance with the value of the contract that has been mutually agreed upon, with a guarantee that every contract has always been budgeted for in the RAPBN/D but in reality (*bankrupt*) In this case, there is a claim from the private party, the goods/services provider. Therefore, we need regulation on how the government can regulate or make clear rules that demand from the private sector no longer arise because, of course, this is very disturbing to government affairs, even though in every contract, it is hoped that it will run well and smoothly. Therefore, risk management is needed against lawsuits from private parties. The research method is normative research with a concept approach (especially the concept of risk management, government default, goods/services procurement contracts and good faith); the case approach and the relevant statutory approach were used in this study. This study aims to examine and elaborate more on the government's default risk management arrangements in government goods/services procurement contracts from the principle of good faith. Procurement of goods/services from the perspective of good faith. Risk management arrangements are needed to avoid the risk of claims from the private sector, in this case, providers of goods/services against the government with affirmation actions in laws and regulations related to the procurement of government goods/ services, that when the government defaults/defaults it does not interfere with the implementation of government duties.

1. Introduction

In implementing its vision and mission, the state carries out government duties and development tasks to achieve good governance: an effective, efficient, transparent, accountable, and responsible administration.¹ Many ways need to be done to make the practice of good governance happen. All parts of the institutional elements involved in good governance must be changed; these elements include the government as a representative of the state, market players, the business world and civil society. These parts must function optimally and complement each other to achieve community welfare. To build a government system that is more in favor of the interests of the people and in accordance with the principles of democracy as a whole, it is very important to implement good governance. Good governance This means that the activities of a government institution are carried out based on the interests of the people and applicable norms to realize the country's ideals. Advancing general welfare is one of the goals of forming the Indonesian state government, as stated in the fourth paragraph of the Preamble to the 1945 Constitution. Procurement of government

¹ N.P.T Widanti, "Konsep Good Governance dalam Perspektif Pelayanan Publik: Sebuah Tinjauan Literatur", *Jurnal Abdimas Peradaban* 3, no 1 (2022): 73-85.

goods/services is a fundamental component of good governance.² The state, private sector and society are the three main pillars Good Governance;³ therefore, understanding governance is to understand how to integrate the roles between government (bureaucracy), private sector and civil society in a mutually agreed upon rule of play.⁴ Procurement of goods/services is a major issue in developed and developing countries. For this reason, several countries have created regulations and models for procuring government goods/services, such as The United Nations Commission on International Trade Law (UNTRICAL), which produces legal models and conventions related to the procurement of goods/services, namely models Law on Procurement of Goods, Contract and service (PGCS) which was established on June 15 1994 and has been ratified by Indonesia through Law Number 7 of 2006 concerning Ratification United Nations Convention Against Corruption (hereinafter referred to as Law No. 7/2006). The Indonesian government has ratified the United Nations Convention Against Corruption (UNCAC) with Law No. 7 of 2006.

Government procurement activities for goods and services have three important and strategic meanings in legal development. First, government procurement of goods and services has a strategic role in protecting and promoting domestic actors. Second, government procurement of goods and services is an important component of economic growth. Third, suppose the government goods and services procurement system can implement the principles of good governance. In that case, it will encourage efficient and effective public spending while conditioning the behavior of the three pillars of government, private and community governance.⁵ In procuring goods/services, the government will frame the legal relationship with the provider of goods or services in a goods or services procurement contract. In other words, the government becomes a party to a contract. In this context, the government cannot position itself as higher than the provider of goods or services, even though the government is an institution that carries out regulatory actions (regulator). This is because, in contract law, the parties have the same position, as reflected in article 1338 of the Civil Code, hereinafter referred to as the Civil Code. In such a context, the government and providers of people/services have equal positions in fulfilling the rights and obligations in the agreed contracts. The government, in carrying out the procurement of goods and services, collaborates with third parties or partners through tenders based on article (3) of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services will (hereinafter referred to as Presidential Decree No.16/2018,) Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services that self-management and/or providers carry out the procurement of goods/services. The provider in question can work if he has been determined to win the tender through direct appointment, as confirmed in article (9) letter n point (1), Presidential Decree No. 16/2018.

² V, Mahardhika, "Pertanggungjawaban Pidana Pejabat Pembuat Komitmen Sebagai Upaya Pencegahan Korupsi Pengadaan Barang/Jasa Pemerintah", *Jurnal Hukum Samudra Keadilan* 16, no 1 (2021): 140-155.

³ Dkk, Wairocana, *Hukum Penyelenggaraan Kekuasaan Negara* (Swasta Nulu, 2018).

⁴ H,Purwosusilo et M SH, *Aspek Hukum Pengadaan Barang dan Jasa* (Prenada Media, 2017).

⁵ M,Kamal, "Analisis Politik Hukum dalam Pengadaan Barang dan Jasa Pemerintah", *Jurnal Pro Justice: Kajian Hukum dan Sosial* 1, no 2 (2020): 1-10.

The government's involvement in this contract shows that its actions are classified as civil government actions. Concerning civil legal actions in the administration of government affairs⁶, it states that: "Even though civil legal actions for government affairs by state administrative bodies or officials are possible, it is not impossible that various provisions of public law (state administrative law) "will infiltrate and influence civil law regulations. For example, several provisions of laws and regulations specifically regulate certain procedures or procedures that must be followed regarding civil legal action efforts carried out by state administrative bodies or officials. "The government is a legal subject in civil actions; the government is a legal entity because, according to Apeldoorn, as quoted by Philipus M. Hadjon, the state, provinces, municipalities, and others are legal entities. It is just that its establishment was not carried out specifically but grew historically. The government is considered a legal entity because it carries out commercial activities (acts of management).

As a subject of civil law, the government can bind itself with third parties, in this case, providers of goods/services. The rights and obligations of each party, including implementation procedures, must be regulated and stated in the form of a contract. The government's position in civil law relations differs from other private law subjects, namely individuals and legal entities. As subjects of civil law, the government can bind itself with third parties, such as providers of goods or services. The rights and obligations of each party, including implementation procedures, must be regulated and stated in the form of a contract. There is a guarantee that every contract is always budgeted for in the RAPBN/D, but in reality, there is a demand to pay for the work of the private sector, in this case, the provider of goods/services. As happened in the case of Supreme Court Decision Number 2872/K/PDT/2014, the case was between Muhamad Nadjib and the government. In this case, the head of the East Nusa Tenggara provincial public works service is the head of the South Central Timor district public works service.

How can the government regulate or create clear regulations without demands from private parties because this interferes with government affairs? Every contract is, of course, expected to run well and smoothly. Therefore, risk management is needed against lawsuits from private parties. If it is not regulated, it can potentially interfere with the government in government affairs. Of course, this will impact the welfare of Indonesian society in general. For this reason, it is necessary to regulate risk management for government failure to pay in contracts for the procurement of goods/services and how to manage it so that the government is not sued for compensation by the private sector because this will disrupt government administration. Therefore, risk management is needed in contracts for the procurement of goods/services that the government's duties are not disturbed by demands that the government fulfill demands to pay compensation from private parties. Therefore, a clear arrangement is needed to provide legal certainty and justice for the community.

Government cannot be separated from its duties and responsibilities to provide goods/services because the availability of goods/services is part of the government's duties and responsibilities to meet the needs of the people and the government's needs in running the government. As a public legal entity, both the central government and regional

⁶ Fauzan Khairazi, "Implementasi Demokrasi dan Hak Asasi Manusia di Indonesia", *Inovatif: Jurnal Ilmu Hukum* 8, no 1 (2015): 72-94.

governments not only carry out legal acts of a public nature but can also carry out legal acts of a civil nature. One of the government's legal actions in private law is implementing contract laws to procure government goods/services to meet the needs of public service infrastructure⁷. The consequence of the government's use of civil law instruments, especially contract law in managing government affairs, is a legal mixing between public law and private law in contractual relationships. The government's involvement in this contractual relationship is different from commercial contracts in general because the characteristics of this contract are no longer purely private law acts. However, there is also a mixture of public law in it. Contracts made by the government, therefore, have different characteristics from private contracts in general. The existence of a public color in contract law is a characteristic that differentiates it from commercial contracts in general.⁸

The principle of good faith (Utmost Good Faith) is the most important in contract law. The principle of good faith is one of the legal instruments to limit freedom of contract and the binding force of agreements.⁹ According to R. Subekti in Murni R¹⁰, good faith takes the form of agreeing; a person with good intentions will be honest, put complete trust in the opposing party whom he considers honest and will not hide anything bad that has the potential to cause difficulties in the future. Thus, good faith in contractual relationships aims to create legal certainty and a sense of fairness for the contracting parties. It is necessary to understand that good faith is very important in every stage of the contract for the procurement of government goods/services, and this is interesting to study in more depth, including government default risk management arrangements in contracts for the procurement of government goods/services from the perspective of the principle of good faith and how the principle of good faith is relevant both with government procurement contracts for goods/services.

The principle of good faith is needed in contractual agreements that justice can be achieved for the parties, in this case, justice for the goods/services provider who has worked to complete what is their obligation and must receive what is their right. However, in reality, what happened was different from the expectation that the government would pay the amount of money according to the agreement stated in the contract. Thus, it can be said that the government has failed to pay, or in the civil aspect, it can be said that the government has defaulted that the provider of goods/services demands compensation from the government. This, of course, will make the government have to serve the compensation claim, as happened in the case contained in the Supreme Court Decision Number 2872/K/PDT/2014, a case between Muhamad Nadjib and the government, in this case, the head of the employment service general of East Nusa Tenggara province head of public works department of South Central Timor district. Head of Public Works Office of East Nusa Tenggara Province c.q Head of Public Works Office of Central Timor district Regency The decision legally states that the

⁷ B D Manery, "Makna dan Fungsi Itikad Baik dalam Kontrak Kerja Konstruksi", *Sasi* 23, no 2 (2018): 136-148.

⁸ (Purwosusilo 2017)

⁹ K Ridwan, *Itikad Baik Dalam Kebebasan Berkontrak* (Jakarta: Indonesian University Graduate School of Law, 2004).

¹⁰ R Murni, N K S Dharmawan, et P A Samsithawrati, "Transformasi Good Faith Principle Dalam Hukum Perbankan Khususnya BPR: Perspektif Lokal Nasional dan Internasional", *Arena Hukum* 11, no 3 (2018): 571-599.

government, in this case, the head of the public works department of East Nusa Tenggara Province, the head of the public works department of South Central Timor district, has broken his promise (default) on the work contracting agreement letter (contract) Number PJPP.600.602.1/ 317.A/2008 dated 5 August 2008 and contract agreement (contract) Number PJPP .600.602.1/317.A/2008 dated 30 October 2008 and sentenced to pay the material losses suffered by the plaintiff amounting to Rp. 504,778,706.00 (Five One hundred and forty million seven hundred seventy-eight thousand seven hundred and six rupiah). The case that the author conveys still uses the old goods/services procurement regulations, namely Presidential Decree Number 54 the Year 2010 Concerning Government Procurement of Goods/Services (hereinafter referred to as Presidential Decree No.54/2010), in the author's opinion this is worthy of being explained for the reason that *First* Presidential Decree No. 16/2018 has only just been implemented there have been no cases arising from the implementation of this regulation. From the description of the case, it appears that there was no good faith on the part of the government to pay the amount of money as specified in the contract.

The difference between this research and previous studies that examined similar issues related to this research is the *first* previous research conducted by Niru Anita Sinaga entitled "Government Goods/Services Procurement Agreements concerning the Principle of Balance in Contract Law."¹¹ This research discusses related matters and the role of the government in its authority to provide legal protection for parties in agreements regarding the procurement of government goods/services, including through regulations. *Second*, Muskibah and Lili Naili Hidayah conducted research titled "Application of the Principle of Freedom of Contract in Standard Contracts for Procurement of Government Goods and Services in Indonesia."¹² This research discusses related matters from applying the principle of freedom of contract in contracts to procure goods and services at the pre-contractual and post-contractual stages. *Third*, Harry Ismaryadi, Khairani, and Yussy Adelina Mannas conducted research on "Implementation of the Principle of Good Faith in Providing Opportunities for Completion of Government Procurement of Goods and Services."¹³ This research discusses the application of good faith in employment contracts based on indicators of propriety, attitudes and behavior, elements of abuse of circumstances, rationality, impartiality, and reasons for changes in compliance with regulations, namely the pre-contract stage and the objective good faith stage. Meanwhile, this research discusses government default risk management arrangements in government procurement contracts for goods/services from the principle of good faith. The government's PBJ agreement Procurement of goods and services aims to protect the public interest. However, it remains commercial, meaning that both parties, namely the provider of goods/services and the Government, are oriented towards the benefits of making or implementing the contract. Providers of goods/services as partners have the aim of making a

¹¹ N A Sinaga, "Perjanjian Pengadaan Barang/Jasa Pemerintah Kaitannya Dengan Asas Keseimbangan Dalam Hukum Perjanjian", *Jurnal Ilmiah Hukum Dirgantara* 9, no 2 (2019).

¹² M Muskibah et L N Hidayah, "Penerapan Prinsip Kebebasan Berkontrak Dalam Kontrak Standar Pengadaan Barang Dan Jasa Pemerintah Di Indonesia", *Refleksi Hukum: Jurnal Ilmu Hukum* 4, no 2 (2020): 175-194.

¹³ H Ismaryadi, K Khairani, et Y A Mannas, "Implementasi Asas Itikad Baik Dalam Pemberian Kesempatan Penyelesaian Pekerjaan Pengadaan Barang Jasa Pemerintah", *UNES Journal of Swara Justisia* 7, no 2 (2023): 680-694.

profit. Therefore, in government contracts, it is necessary to provide reasonable protection for private parties/providers.

2. Methods

The research method used in examining government default risk management arrangements in government procurement contracts for goods and services from the perspective of the principle of good faith is a normative research method with a conceptual approach (especially the concepts of risk management, government default, procurement contracts for goods/services and good faith) a case approach, as well as a relevant legislative approach, are used in this study.

3. Results and Discussion

3.1 The Essence of Good Faith Principles in Government Goods and Services Procurement Contracts

Article 1338 (3) of the Civil Code states that "agreements must be executed in good faith." What is meant by good faith (in good faith)? The legislation does not provide a firm and clear definition. In the Big Indonesian Dictionary, what is meant by good faith is trust, steadfast persistence, intention, and (good) will. Andrea Fokema's legal dictionary explains that "good loyalty" is the intention or spirit that animates the participants in a legal relationship.¹⁴ Meanwhile, Black's Law Dictionary gives a summary.¹⁵

"Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it compasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or seek an unconscionable advantage. An individual's good faith is a concept of his mind and inner spirit and may not be determined by his protestations alone. In common usage, this term is ordinarily used to describe a state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, being faithful to one's duty or obligation".

Regulation of Article 1338 (3) of the Civil Code stipulates that agreements must be carried out in good faith (a contract of good faith based on good faith). The meaning is that the contract must be carried out according to propriety and justice. According to J. M. van Dunne, the power of good faith (good loyalty; good faith) covers the entire contract process or is likened to the rise and fall of a contract. Good faith includes three phases of the contract journey, namely (1) the pre-contractual phase, (ii) the contractual phase, and (iii) the post-contractual phase. Article 1338 (3) of the Civil Code is always linked to Article 1339 of the Civil Code, which states that agreement is not only binding on what is expressly determined therein but rather with something which, according to its nature, agreement is required based on justice, custom, or law (the justice referred to here is faith).

3.2 The Essential Role of Good Faith in Government Default Risk Management in Procurement Contracts

Many contracts for the procurement of goods and services are carried out by the government with private parties, thus increasing the risks the government faces. Risk management is an effort to strengthen institutions such as banks. In the author's opinion, this can also be analogous to the government: to improve government services to the community,

¹⁴ S J F Andreae, N E Algra, et H R W Gokkel, "Kamus Istilah Hukum Fokkema Andreae: Belanda-Indonesia", (Binacipta, 2020).

¹⁵ H C Black, "Black Law's Dictionary", 2000.

in this case relating to contracts for the procurement of goods and food services, there must be government default risk management arrangements. In goods/services procurement contracts in cases of government failure to pay in government goods/services procurement contracts. Risk can be interpreted as a situation a company faces with the possibility of harm. Risk is the threat or possibility of an action or event that will have an impact opposite (negative) to the goal to be achieved. Furthermore, in Financial Services Authority Regulation No. 13/POJK.03/2015, hereinafter referred to as PJOK, Financial Services Authority Regulation Number 13/Pojk.03/2015 Concerning the Implementation of Risk Management for Rural Banks, risk is the potential for loss due to a certain event. Based on this definition of risk, it can be concluded that risk is a situation that is not expected to occur, in this case, a failure to pay the government in a goods and services procurement contract.

Like banks, in the author's opinion, the government also needs risk management arrangements in contracts for the procurement of goods and services in order to reduce or even eliminate the need for compensation from goods and service providers because this interferes with the government's ability to carry out government and development tasks. Risk management is a field of science that discusses how an organization works. Furthermore, PJOK determines that risk management is a series of methodologies and procedures that will be used to identify, measure, monitor, and control risks arising from all Rural Bank activities. In connection with this article, it can be said that, in the author's opinion, the government requires management. Risks in contracts for the procurement of goods or services from a good faith perspective, where with the good faith of the parties to carry out their obligations in the contract, the other party can enjoy the rights that must be obtained from the activities of the contract. Risk management includes supervision, policies, risk management procedures, determining risk limits, processes, and systems. Good faith is distinguished by its relative and absolute nature. In relative good faith, people who pay attention to the real-life attitudes and behavior of the subject. Based on objective good faith or things in accordance with common sense and justice, an objective measure is created to assess the circumstances surrounding the legal action (an impartial assessment according to objective norms). The parties' good faith in agreeing must pay attention to propriety. Good faith is a filter based on moral values and propriety for the existence of a contract after the contract is declared valid based on the legal conditions of the contract as regulated in Article 1320 of the Civil Code. The value of legal certainty and justice is related to the principle of the government's good faith in paying the amount of money as mutually agreed upon in the government procurement agreement for goods and services. Good faith should be the basis for understanding and implementing an agreement in order to provide a feeling of comfort in implementing a contract and thereby provide legal certainty and justice.

According to Ridwan Khairandy, good faith is divided into subjective and objective good faith. Subjective good faith is contained in the pre-agreement. Good faith at the pre-agreement stage is an obligation to notify, explain, and research material facts for the parties relating to the negotiated subject. Meanwhile, objective good faith is contained in Article 1338, paragraph (3) of the Civil Code, namely that an agreement must be implemented in good faith. What is meant in Article 1338, paragraph (3) of the Civil Code is that the agreement must be implemented by observing the norms of propriety and decency. The implementation of the

contract must be on the right track. Based on modern contract theory, in the pre-contract stage, the party who experiences loss should have their rights protected that pre-contract promises impact those who violate them. Regarding applying the principle of good faith at the pre-contract-making stage, it can be explained that if the implementation of a contract creates an imbalance or violates feelings of justice, the judge can adjust the rights and obligations stated in the contract. In contract law, judges use their authority to interfere with the contents of the contract. It seems that good faith must exist not only at the contract creation (signing) and post-contract creation (implementation) stages but also at the pre-contract creation (drafting) stage. Risk is a consequence of every business; therefore, anyone who runs a business always tries to minimize the risk. To reduce risks, legal instruments are needed to protect the parties to the contract that they can balance the rights and obligations of the parties. The balance of rights and obligations is a principle in a contract, including contracts for procuring government goods and services.

The term agreement is commonly used in the business field at all levels. An agreement is a decision of the will of two parties, that people are bound to the agreement because of their own will. An agreement is an agreement made by the parties. The parties are bound to give something, do something or not do something. This agreement gives birth to the rights and obligations of the parties.¹⁶ An agreement is the source of an agreement. In contrast, an agreement is defined as a legal relationship between two people or two parties, based on which one party has the right to demand something from another party, and the other party is obliged to fulfill that demand. An agreement is an event where someone makes a promise to another person or two people promise each other to do something. Based on this event, a legal relationship arises between the two people, which is called an engagement. Therefore, non-implementation or failure to fulfill achievements by one party will give rise to demands from the other party to fulfill these achievements. Article 1313 of the Civil Code defines an agreement as "an agreement by which one or more people bind themselves to one or more other people. Regarding the conditions for the validity of an agreement according to the Civil Code, it is regulated by the provisions of Article 1320 of the Civil Code. Which consists of: a. agree with those who bind themselves; b. the ability to create an agreement; c. a certain thing; d. a lawful cause. Several principles that often underlie every contract usually consist of the principle of freedom of contract, the principle of consensualism, and also the principle of binding agreements.

Adherent countries have common *law systems*, as England generally rejects the use of the principle of good faith in agreements; historically, this principle of good faith originates from the contract law system in civil law, which originates from Roman law. The principle of good faith is incompatible with legal certainty because it has no basis for its use, and its meaning is highly interpretive. There are concerns that it could disrupt legal certainty. America is a country that adheres to the system of common *law*, which has accepted the principle of good faith, represented in the American Law Institute's Restatement (Second) Contract. As an illustration regarding the understanding of the principle of good faith, the opinion of judges in the Netherlands was expressed in the decision of the *High Council*, which states that the

¹⁶ M Arifin, "Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian", *Jurnal Ius Constituendum* 5, no 1 (2020): 66-82.

principle of good faith refers to rationality and propriety (reasonableness and fairness) who live in society. According to Kolopaking, as quoted by Dharmawan, the principle of good faith comes from the contract law system, a civil law originating from Roman law. In contrast, the common law system traditionally does not recognize the principle of good faith. The United States is one country that adheres to the common law system and has accepted the principle of good faith in its contract law system.¹⁷ Government goods/services procurement activities are regulated in Presidential Decree No. 16/2018. The Presidential Decree establishes the following principles: Efficiency, Effectiveness, Transparency, Openness, Competitiveness, Fairness, and Accountability. These principles are intended so that at every stage of the contract, the government and the provider involved in a procurement contract must be guided by the principles in question. These principles are intended that at every stage of the contract, both the government and the suppliers involved in the procurement contract must be guided by these principles. However, these principles are not sufficient because it is necessary to add the principle of good faith from the parties, namely both the government and service providers, in order to be able to implement rights and obligations in accordance with the agreed contract

4. Conclusions

In essence, good faith is the honesty and decency of the parties involved in a contract, that the parties in good faith will carry out what has been mutually agreed upon. In order to avoid the risk of demands from private parties, in this case, providers of goods and services, against the government, risk management arrangements are needed in the form of confirmations in laws and regulations relating to the procurement of government goods and services, that when the government fails to pay or defaults, this does not happen. Interfere with the government's implementation of governmental duties. In order to realize community prosperity, the government needs to create a policy regarding the risk management of government default in contracts for the procurement of goods and services in the form of confirmation in statutory regulations that procurement of goods/services needs to be made in the form of a law, not only limited to presidential regulations, that the government is not busy responding to demands from private parties due to various demands for compensation from goods and services providers.

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¹⁷ Murni, Dharmawan, et Samsithawrati, "Transformasi Good Faith Principle Dalam Hukum Perbankan Khususnya BPR: Perspektif Lokal Nasional dan Internasional".

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